

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

MARTIN P. KIEFABER, on behalf of himself and
all others similarly situated,

Plaintiff,

V.

Case No. 1:10-CV-1194-AJT

HMS NATIONAL, INC., *et al.*,

Defendants.

EMERGENCY MOTION TO STRIKE NOTICE OF HEARING

Comes Now Defendant HMS National, Inc. (“HMS” or “Defendant”), through counsel, and moves to strike the Notice of Hearing (Docket No. 86) filed by Plaintiff Martin P. Kiefaber (“Plaintiff”) on December 9, 2011, purporting to set Plaintiff’s Motion to Compel for a hearing on December 16, 2011, and in support thereof states as follows:

1. The Motion to Compel (Docket No. 84) is untimely under the Rule 16(B) Scheduling Order, and in any case, since Defendant's opposition to the Motion to Compel is not due until December 23, 2011, a hearing on December 16, 2011 is not appropriate and the Notice of Hearing should be stricken (and any hearing scheduled on the basis of said Notice, vacated).

2. Plaintiff filed a Motion to Compel, a redacted version of a Memorandum of Law in support of the Motion to Compel, and a Notice of Hearing, on December 9, 2011, minutes before 5 p.m. (Docket Nos. 84, 85, 86).

3. Plaintiff did not file his counsel's Declaration in support of the Motion to Compel (filed in redacted version, which forms an integral part of Plaintiff's Memorandum of Law), or serve the unredacted papers, until after 5 p.m.

4. Plaintiff did not seek Defendant's consent to the hearing date (or to accelerated briefing), nor did Plaintiff ask the Court for an accelerated briefing schedule.

5. Under Local Civil Rules 7(F) and 37(B), Defendant's Opposition to Plaintiff's Motion to Compel is due December 23, 2011, fourteen days (eleven, plus three for service) after the Motion was filed.

6. By Order of July 14, 2011 (Docket No. 65), the Final Pretrial Conference in this case will be held on December 15, 2011, at 10:00 a.m.

7. A procedure for accelerated briefing and consideration of discovery motions was provided by the Court's Rule 16(B) Scheduling Order, but the deadline for filing non-dispositive motions under that provision was December 2, 2011, at 5 p.m. Rule 16(B) Scheduling Order, ¶ 10 ("All motions, except for summary judgment, shall be noticed for a hearing on the earliest possible Friday before the final pretrial conference.") (Dkt. 74).

8. This is the third time in approximately two weeks that Plaintiff has filed a discovery motion and sought a hearing without giving the notice required by the Local Rules and the Rule 16(B) Scheduling Order.

9. First, Plaintiff filed a Motion to Compel (Docket No. 75) just before midnight on November 25, 2011, during Thanksgiving weekend, and filed a Notice of Hearing (Docket No. 76) that Saturday, purporting to set the Motion for a hearing on December 2, 2011. The Court rejected that Notice of Hearing as untimely and instructed Plaintiff to notice the motion for the following week, but Plaintiff did not set the motion for a hearing, instead filing the "emergency"

motion to extend discovery, which he later abandoned, as discussed below. Plaintiff finally withdrew the Motion to Compel on December 9, 2011.

10. Second, despite missing the discovery motions deadline of December 2, 2011, Plaintiff sought leave of Court on the afternoon of December 5, 2011, to file an “emergency” motion for a one-month extension of discovery (Docket No. 77), forcing Defendant to brief its response within two days (Docket No. 81), for a hearing December 9, 2011. After Defendant filed its opposition, Plaintiff withdrew his motion and cancelled the scheduled hearing (Docket No. 82).

11. Third, Plaintiff has now filed another Motion to Compel (Docket No. 84), seeking relief he previously sought in the prior motions that Plaintiff previously abandoned. Plaintiff has not given any reason for setting a hearing that will be both after the Final Pretrial Conference and substantially before the deadline for Defendant to respond to Plaintiff’s Motion.

12. Defendant will be prejudiced if it is forced to respond to the Motion to Compel on an accelerated basis while preparing for the Final Pretrial Conference, particularly given Plaintiff’s failure to bring either of his two previously-filed motions to hearing.

13. Counsel for Defendant has conferred with Plaintiff’s counsel regarding the timing of Defendant’s Opposition and of the Hearing, in an effort to resolve this issue. Plaintiff opposes this Motion.

Wherefore, Defendant HMS National, Inc., respectfully moves that the Court strike Plaintiff’s Notice of Hearing and continue any hearing on the Motion to Compel until a date after December 23, 2011, when Defendant’s Opposition to the Motion to Compel is due.

Dated: December 12, 2011

Respectfully submitted,

/s/ Michael Y. Kieval

Michael Y. Kieval (VSB No. 71142)

David M. Souders (*pro hac vice*)

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Attorneys for Defendant HMS National, Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of December, 2011, a copy of the foregoing Emergency Motion to Strike Notice of Hearing was electronically filed with the Clerk of the Court using the CM/ECF system, causing service to be effected on all counsel of record.

/s/ Michael Y. Kieval

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